



Atty Gen. Op. No. 11 - IDB10

JOSEPH R. BIDEN, III  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-6499  
TTY (302) 577-5783

August 15, 2011

Ms. Christie Shirey  
302 W. 8<sup>th</sup> Street  
Laurel, DE 19956

**RE: Freedom of Information Act Complaint Against  
Laurel School Board**

Dear Ms. Shirey:

You have asked for an Attorney General's determination as to whether the Laurel School Board ("Board") violated the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), by meeting in executive session on June 22, 2011 to discuss both the district's finances and hiring a Construction Liaison. The Board has provided us with a response to your complaint, which includes the agenda, minutes and draft executive session minutes for the June 22 meeting. This is the Delaware Department of Justice's determination pursuant to 29 *Del. C.* § 10005(e).

**RELEVANT FACTS**

The agenda for the Board's June 22, 2011 regular meeting includes "Executive Session – Discussion of Collective Bargaining and/or Pending or Potential Litigation and/or Personnel." The draft minutes of the executive session of June 22, 2011, indicate that in the executive session the Board discussed:

- the cost of having an extra pay period at the end of the year

- the qualifications of one of the applicants for the position of Construction Liaison, and the financial reasons why the district should hire a construction liaison instead of a building and grounds supervisor
- a personnel recommendation received for a vacant position
- an "update" on a lawsuit
- the need for confidentiality on matters discussed in executive session

The Board's response to your complaint states that none of these matters were voted on in executive session, and the minutes confirm that. During the public portion of the meeting, there was substantial public input on the question of construction liaison versus building and grounds supervisor, and the Board voted, without discussion, to hire one of the applicants as Construction Liaison.

#### **RELEVANT STATUTES**

All meetings of a public body must take place in public, unless the meeting is for one of the nine purposes listed in 29 *Del. C.* § 10004(b). 29 *Del. C.* § 10004(a). Section 10004(b)(1) permits executive session (closed to the public) for "[d]iscussion of an individual citizen's qualifications to hold a job . . . unless the citizen requests that such a meeting be open." Section 10004(b)(9) allows a public body to meet in executive session to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are discussed, unless the employee . . . requests that such a meeting be open."

#### **DISCUSSION**

The Board has overlooked the distinction between an executive session to discuss the qualifications of job applicants (§ 10004(b)(1)) and one to discuss confidential personnel matters

Ms. Christie Shirey  
August 15, 2011  
Page 3

concerning current employees (§ 10004(b)(9)). *See Att'y Gen. Op. 11-1B08*, 2011 WL 3013796, at \*3 (Del. A.G.).

Although members of the public who were interested in the hiring of a construction liaison may not have attended the June 22 public meeting because of the misleading agenda, our precedent is that where the public was substantially involved in the process, we will not require any remediation for the violation of labeling a question of job qualifications as a personnel matter. *Att'y Gen. Op. 06-ID22*, 2006 WL 3387935, at \*4 (Del. A.G.). The minutes of the April 20, 2011 Board meeting show substantial discussion in public of the construction liaison issue, and after the executive session on June 22, the Board heard from the public on the issue, and voted in public. Therefore, the mislabeling of the Agenda was a harmless error that does not need be remedied.

However, the June 22 executive session also went into areas that FOIA does not permit: the cost of having an extra pay period at the end of the year, the financial reasons for hiring a construction liaison instead of a buildings and grounds supervisor,<sup>1</sup> and the need for confidentiality on matters discussed in executive session. It also appears from the draft minutes that the update on pending litigation should have taken place in public, because 29 *Del. C.* §

---

<sup>1</sup> The fact the financial reasons for hiring a construction liaison were publicly discussed on April 20, 2011 (agenda item 10g), does not excuse repeating that discussion only in executive session on June 22. According to the minutes of the June 22 public meeting the reasons given in executive session were not repeated in public, depriving the public of the opportunity to hear that discussion.

Ms. Christie Shirey  
August 15, 2011  
Page 4

10004(b)(4) permits only "[s]trategy sessions" to be held in executive session.<sup>2</sup> These violations will have to be corrected.

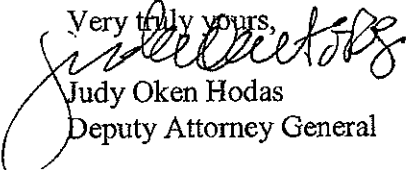
### CONCLUSION

For the reasons stated above, the Laurel School Board violated the Freedom of Information Act in describing the purpose of an executive session as "personnel" when in fact it was to discuss the qualifications of a job applicant. However, because the public was significantly involved in discussion of the issue, we do not seek remediation here. Remediation is necessary for the violations of discussing in executive session the following items:

- the cost of having an extra pay period at the end of the year,
- the financial reasons for hiring a construction liaison instead of a buildings and grounds supervisor,
- an "update" on a lawsuit, and
- the need for confidentiality on matters discussed in executive session.

The Board should put those items on the agenda for the next regular public meeting, and provide this office with a copy of the agenda when it is posted.

Very truly yours,

  
Judy Oken Hodas  
Deputy Attorney General

APPROVED

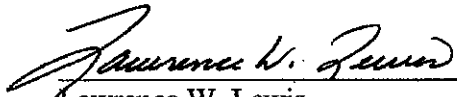
---

<sup>2</sup> The Board may have been misled by its boilerplate agenda item, "Executive Session – Discussion of Collective Bargaining and/or Pending or Potential Litigation and/or Personnel." That broad reference to "Pending or Potential Litigation" may have implied to the Board that any discussion of litigation can be held in executive session.

Ms. Christie Shirey

August 15, 2011

Page 5

A handwritten signature in cursive script, appearing to read "Lawrence W. Lewis", is written over a horizontal line.

Lawrence W. Lewis

State Solicitor

cc: James D. Griffin, Esquire